IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-408

INGALLS SHIPBUILDING CORPORATION,
DIVISION OF LITTON SYSTEMS, INC.,
Petitioner,

versus

DOROTHY T. MORGAN, ERNEST T. MORGAN, JR. AND
TIMOTHY E. MORGAN,
Claimants-Respondents,

DIRECTOR, OFFICE OF WORKERS' COMPENSATION
PROGRAMS,
Respondent.

REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

CASES AND AUTHORITIES CITED

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Claimants-Respondents pray that a writ of certiorari be denied to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on April 20, 1977.

JURISDICTION

The Claimants-Respondents do not question the jurisdiction as set forth in the Petition.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Claimants-Respondents do not question the constitutional provisions and statutes as set forth in the Petition.

QUESTIONS PRESENTED FOR REVIEW

The Claimants-Respondents do not question the questions presented for review as set forth in the Petition but do ask that this Writ of Certiorari be denied.

COUNTER-STATEMENT OF THE CASE

In 1972 Congress substantially rewrote the conditions for coverage under the Longshoremen's Act. The 1972 Amendments to the Act redefined the term "employee" to specifically include, among others, a longshoreman and a shipbuilder, as well as including generally persons engaged in maritime employment.

In addition the Amendments expanded the area of the Act's applicability — "situs". Prior to the Amendments an injury or death which arose out of and in the course of employment was covered only if sustained upon navigable waters including any dry dock. Congress, however, recognized the inequity of limiting coverage to the gang plank or water's edge. The

Act, therefore, was amended to include injury or death of an employee sustained upon navigable waters including any adjoining pier, wharf, dry dock, terminal area, or other area customarily used to load or unload or to build or to repair a vessel.

These Amendments were designed to insure a uniformly applicable compensation remedy which in Congress' discretion and pursuant to its legislative powers, are necessary to protect the amphibious workers.

This cause arose upon the filing of a claim for death benefits by the surviving wife and minor children of Ernest Morgan pursuant to the provisions of the Longshoremen's and Harborworkers' Compensation Act, as amended.

The facts of this case are not in dispute. Ernest Morgan was employed by the employer herein as a ship fitter helper apprentice at its fabrication shop. This shop is used for cutting, shaping, tacking and welding steel parts which are later used in the construction of ships and other seagoing vessels. (Stipulation, at 3-4).

All of the decedent's work was done within the confines of this fabrication shop which is located on Ingalls West Bank Shipyard which abuts the Gulf of Mexico and the Pascagoula River.

On June 22, 1973, Ernest Morgan was killed in the course of his employment as a result of accidental injury. The injury occurred when a steel plate 26 feet in length, 8 feet wide, and 1 1/4 inches thick, and weigh-

ing approximately 6,000 pounds fell on the decedent's pelvis area, lacerating the right groin and severing the femoral artery.

The surviving widow and minor children sought death benefits for the decedent's death pursuant to the Longshoremen's Act. The employer controverted the claim on the ground that the Act is inapplicable and that the claimant's sole remedy was pursuant to the Mississippi State Workers' Compensation Statute.

The case was submitted to the Office of the Chief Administrative Law Judge pursuant to section 19(d), 33 U.S.C. §919(d), of the Longshoremen's Act. Since there was no factual dispute, the parties agreed to the presentation of this case upon the submission of a stipulation of facts and exhibits. See 20 C.F.R. §702.346 (1974). Based upon this record evidence, the administrative law judge issued a compensation order in favor of the claimants, finding decedent's death compensable pursuant to the Longshoremen's Act, as amended.

The employer filed a notice of appeal from this decision with the Board and requested an order staying payment of the compensation award. Subsequently, counsel for the claimant requested the Board to approve a fee for services performed before the administrative law judge. The employer opposed this request on the ground that the case had been appealed. By orders filed June 18, 1975, the Board remanded the case to the administrative law judge with directions to approve an attorneys fee; the Board also ordered all appellate action stayed. The Board further issued an order denying the request for a stay of payment of

compensation. The employer filed a motion for reconsideration and requested the Board to order a stay of payment of the compensation award. The Board denied this motion by order filed July 3, 1975.

On July 28, 1975, the employer filed a petition for review of the Board's order denying a stay of compensation with the United States Court of Appeals for the Fifth Circuit, the employer sought modification of the Board's order. The employer further filed a motion with the court requesting a stay of compensation pending review, pursuant to Rule 18 of the Federal Rules of Appellate Procedure. The Court, by order filed August 20, 1975, denied the employer's motion to modify the Board's order and denied the stay of payment of compensation. On September 11, 1975 a motion was filed with the court seeking to have employer's petition for review voluntarily dismissed, this motion was submitted on behalf of the employer and the claimants.

On April 20, 1977, the Fifth Circuit Court of Appeals affirmed the action of the Benefits Review Board.

The Claimants-Respondents take issue with the statement of fact contained on page 6, last paragraph of Petitioner's Petition for Writ of Certiorari when it is asserted that Ingalls, West Bank, does no repair work. This statement is not supported in the record, but in Exhibit "N" (AP 240), the job description of a shipfitter requires him to remove and *repair* or replace damaged parts of ship structures. (Emphasis added)

ARGUMENT

I. Congress Did Extend The LHWCA To Employees Of A Shipbuilder Who Were Shore-Based, Non-Maritime And Would Not Otherwise Be Covered By The Act For Part Of Their Activities.

The Longshoremen's and Harborworkers' Compensation Act Amendments of 1972[1] substantially altered and expanded the area of the Act's coverage — "situs" —. Compensation benefits are provided for

> * * * disability or death of an employee, but only if the disability or death results from an injury *occurring upon the navigable waters* of the United States (*including any* adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other *area customarily used* by an employer in loading, unloading, *repairing*, or *building a vessel*.
>
> Amendments, §2(c), 86 Stat. 1251 33 U.S.C. §903(a) (Supp. III, 1973). (Emphasis supplied)

The amendments also eliminated the purely situs orientation of the Act by further conditioning coverage upon a showing that the claimant satisfies a "status" test:[2]

---

1 Pub. L. 92-576, 86 Stat. 1251 *et seq.*

2 Prior to the Amendments, the Longshoremen's Act was applicable only to injuries or deaths sustained upon the navigable waters including any dry dock. 33 U.S.C. §903(a) (1970 ed.); *Nacirema v. Johnson*, 396 U.S. 212 (1969).

> The term 'employee' means any person engaged in maritime employment, *including* any longshoreman or other person engaged in longshoring operations, and *any harborworker including* a ship repairman, *shipbuilder*, and ship-breaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.
>
> Amendments, §2(a), 86 Stat. 1251, 33 U.S.C. §902(3) (Supp. III, 1973). (Emphasis supplied.)

The amended Act, therefore, has adopted a new two-pronged test for purposes of determining its applicability namely, "situs" and "status".

There is no dispute that claimant was employed as a shipfitter and was engaged in the process of building ships. (AP 223) At the time of injury, claimant was clearing a main engine plate which would be used or installed aboard a vessel under construction which was Hull 4404. (AP 236 — Exhibit "G") Additionally, the employer admits that it is engaged in the business of new ship construction. (AP 223)

The employer contends, however, that claimant's employment does not satisfy the "status" test, that he is not an "employee" within the meaning of the Act because he was not engaged in "maritime employment" as that term has been "defined and refined, by the courts through the years."

As previously noted an "employee" means:

> Any person engaged in maritime employment, *including* any longshoreman or other person engaged in longshoring operations, and *any harbor-worker including a ship repairman, shipbuilder,* and ship-breaker. . . .
>
> Amendments, §2(a), 86 Stat. 1251, 33 U.S.C. §902(3) (Supp. III, 1973). (Emphasis supplied)

This definition expressly expands and includes within the term maritime employment, for purposes of "status", the subsequently enumerated persons and specifically includes shipbuilders. Indeed, as noted in a leading treatise:

> It is evident that the intent of the Congress in defining the term employee as it has in this Act [amended Longshoremen's Act] is to include within the coverage of the Act all maritime employees, other than those specifically excluded. *In order to leave no room for any doubt,* longshoremen and persons performing longshoring operations *are specifically included,* and *so are harbor workers,* ship repairmen, *shipbuilders,* and ship breakers *so that in the case of such persons it is quite unnecessary to engage in any abstract discussion of the meaning of maritime employment.*
>
> 1A *Benedict on Admiralty,* §16 (7th Ed. (rev.) 1973) (Emphasis supplied).

The correctness of this analysis of the definition of "employee" is not only apparent from the statutory language but is further supported by the legislative history of the 1972 Amendments.

The Section-By-Section Analysis of S. 2318,[3] which is included in the Report of the Senate, S. Rep. No. 92-1125, 92d Cong., 2d Sess., at 16 provides:

> Section 2(a) amends section 2(3) of the Act to define 'employee' as any person engaged in maritime employment. *This definition specifically includes any* longshoreman or other person engaged in longshoring operations, and any harbor worker, including a ship repairman, *shipbuilder* and ship-breaker. * * *
>
> S. Rep. No. 92-1125, at 16. (Emphasis supplied)

See also, Report of the House of Representatives, H.R. No. 92-1441, 92d Cong., 2d Sess., at 14.

We submit, therefore, that the statutory definition of "employee" as supported by the legislative history conclusive proves that Congress intended and expressly provided for the inclusion of any shipbuilder within the definition of employee. Thus, we submit all that remains to be determined for purposes of the applicability of the Act is whether claimant is a shipbuilder.

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3 S. 2318 was the bill ultimately passed by Congress as Pub. L. 92-576, the 1972 Amendments to the Act which is presently under review.

In the decision and order under review, the Board affirmed the findings of the trier of facts that the claimant was a shipbuilder. The administrative law judge concluded that claimant's duties were essential to and vital to the building and repairing of ships.

The employer, however, has failed to note that the proposed guidelines issued by the Department of Labor which specify covered employees without attempting to be all inclusive or exclusive, lists the types of work performed in adjoining areas which are covered.[4]

These proposed guidelines, we submit, suggest that the determination of the Act's applicability must be predicated upon a functional analysis of a claimant's duties. That Congress intended "status" to be determined by such functional analysis is suggested by the comments of Congressman Steiger of Wisconsin:

> The latter change [new definition of 'employee'] was made so that a determination of coverage can be made on the basis of the definition of 'employee'. Under the present law that definition is so vague that the determination must be made on the basis of whether the injured individual was working for a covered 'employer'. The *expansion of coverage is intended to bring about a measure of compensation uniformly applicable to persons customarily considered to be working in the business*. Thus even if an employee does not

4 See proposed Department of Labor Guideline, §7105, 39 *Fed. Reg.* 18269 (1974), listing work in "Fabricating Shops" as illustrative of a type of shipyard work which may be covered.

> happen to be over navigable waters at the time he is injured, he will be covered as long as he is working as a longshoreman or harbor worker, whether engaged in repairing a vessel or unloading it.
>
> 118 Cong., Rec. 36389
> (Emphasis Supplied)

We submit that Congress did not intend to restrict the benefits of the Act in the manner advanced by the employer — limiting coverage to persons only if a part of their activities is directly involved in installing the fabricated parts onto the vessels on navigable waters, drydocks, marine railways or on building ways. The construction of a vessel requires the skills and services of a diverse and varied class of workers. This work is performed in a variety of places, not limited to the area surrounding the hull of the vessel. Indeed, in amending the Act, Congress recognized the numerous areas in which a covered employee would be employed, and it expressly included an injury sustained on "any adjoining pier, wharf, *dry dock*, terminal, *building way, marine railway, or other adjoining area customarily used* by an employer in . . . building a vessel." Amendments §2(c), 86 Stat. 1251, 33 U.S.C. §903(a) (Supp. III, 1973).

It is submitted that Ernest W. Morgan was an employee as that term is defined in 33 U.S.C.A. §902(3).

II. The "Ongoing Shipbuilding" Test Adopted By The Fifth Circuit Court Of Appeals In *Halter Marine* As Applied To This States The ". . . Clearly Expressed Congressional Perpetuation Of The Essential Element Of Admiralty Jurisdiction Over The Employee . . ." Which Is Apparent From The Congressional Hearings. There Is No Conflict In The Case Sub Judice, With Settled Principles Of Admiralty And Maritime Law Adopted By This Court And The Decision Of The United States Court Of Appeals For The Ninth Circuit In *Weyerhauser*.

Section 3(a) of the Act includes as the navigable waters of the United States,

> any adjoining pier, wharf, dry dock, terminal, building way, marine railway, *or other adjoining area customarily used by an employer in loading*, unloading, *repairing, or building a vessel*. 33 U.S.C. §903(a) (Emphasis Supplied)

Ingalls' Fabrication Shop is a building 332 feet by 666 feet located on the premises of Ingalls' West Bank Shipyard. (See Exhibits "K" (Supp. AP 26) and "L" (Supp. AP 27). The center of the building is over 910 yards or approximately one-half mile from the Gulf of Mexico to the south and over 481 yards or approximately one-quarter mile from the Pascagoula River to the east. As Exhibit "L" (Supp. AP) and the stipulations of record demonstrate, the operations in the Fabrication Shop comprise various stages in a total

and integrated shipbuilding process as it occurs at Ingalls' yard in Pascagoula, Mississippi. Raw steel is brought into the yard by barge or rail. It is moved by cranes, fork-lifts, and other machinery inside the Fabrication Shop, where ship parts and units — framing and various foundation structions are fabricated and constructed. They then are transported to another place on Ingalls' premises for further work[5] or storage. Three to five percent of the structures go directly to the modular assembly or integration area. As the parts or components are needed, they are moved from a storage area to the sub-assembly area where they are incorporated into larger units. Then they are moved to the integration area where they are fitted together or further integrated. The integrated modules are launched by means of the launch pontoon. The entire process is diagramed in Exhibit "L". (Supp. AP 27)

The evidence of record unquestionably shows that Ingalls' West Bank Shipyard, adjoining navigable waters on the south and the east, is, in its entirety, an area customarily used in shipbuilding. Apparently no other business is conducted at the shipyard, and shipfitters employed by Ingalls' in furtherance of this business, work either in the Fabrication Shop, as Morgan did, or in other designated areas in the yard.[6] See Exhibit "L". (Supp. AP 27)

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5 Further work may include cleaning, buffing, blasting or painting.

6 In March 1973, there were two Departments at Ingalls for the Shipfitter classification, those assigned to work on launched ships, on erection in the modular assembly area, or on subassembly in the sub-assembly area and those assigned to the Fabrication Shop. Transfers either by initiative of the employee or management are subject to approval by the General Superintendent of Fabrication and the Director of the department involved. (AP 226)

The only conceivable argument that could be presented in opposition to a proposed finding that the situs of Morgan's fatal injury is within the Act's coverage, is an argument that is totally spurious: that the Fabrication Shop does not actually touch the water. To argue that the immediate "area" of the injury must touch the water is to argue the absurd. Given the magnitude of modern shipbuilding operations, necessitated by the size of the ships themselves, which are often over 1000 feet long, an area customarily used by an employer in the ship construction business, an area like the Fabrication shop, would *never* touch the water. Only the dry docks and, as shown in Exhibit "L", (Supp. AP 27) the launching pontoon, and the outfitting docks actually touch the water. The stipulations and Exhibits show unequivocally that the areas used in the shipbuilding process include the Fabrication shop where Morgan was killed. In fact, the entire West Bank Shipyard, utilized by Ingalls in its ship construction business, and bordered on two sides by navigable waters, is an "adjoining area" within the meaning of §3(a) of the Act. Morgan who suffered a fatal injury in the Fabrication Shop when a steel plate 26 feet in length, 8 feet wide, and 1 1/4 inches thick, weighing approximately 6,000 pounds fell on him, was clearly in an adjoining area customarily used by an employer in shipbuilding.

Subsequent to the case of *Jackson Shipyard, Inc. vs. Perdue*, 539 Fed. 2d 533 (5th Cir. 1976), the Third Circuit in *Dravo Corp. vs. Maxin*, 545 Fed. 2d 374 (3rd Cir. 1976), had an opportunity to pass on the new amendments of the Longshoremen's and Harbor

Workers' Act. In the *Dravo* case, Maxin was working in the structural steel shop, in his usual place of employment, burning steel plates which would ultimately become bottoms and decks of barges fabricated at Dravo, when he sustained an injury resulting in a below-knee amputation of both legs. The enclosed structural steel shop was located about 2000 feet from the north channel of the river. The Third Circuit, citing *Jacksonville Shipyard, Inc. vs. Perdue*, supra., held that the Claimant's employment in relationship with Dravo fell within the perimeters of the term "shipbuilding". The Court stated as follows, to-wit:

> * * * On the facts of this case, it is clear that Maxin's employment functions for Dravo were an intergal part of the new ship construction activity conducted there. We conclude therefore, that the Claimant satisfied the 'functional relationship' test of *Johns* and extent of the expanding coverage of the 1972 Amendments.

It is submitted that the "ongoing shipbuilder" test as applied in this case carries out the intent of Congress in the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act.

III. The Fifth Circuit Court Of Appeals Has Correctly Defined The Intent Of Congress To Include Land-Based, Non-Maritime Employees Of A Shipyard Who Would Not Otherwise Be Covered By The Act For Part Of The Activity. Congress Did Not Exceed Its Authority Under Article III, Section II, P. 1 Of The Constitution.

Article III, Section 2 of the United States Constitution provides: "the judicial power shall extend . . . to all cases of admiralty and maritime jurisdiction . . ." There is no limitation on this grant beyond that contained in the words "admiralty" and "maritime". Likewise, while containing no express grant of legislative power over the substantive law, the Supreme Court has historically recognized Congress' power in this area. *See*, e.g., *The Lottawana*, 88 U.S. (21 Wall.) 558 (1875); *Panama Railway Co. v. Johnson*, 264 U.S. 382 (1924); *Crowell v. Benson*, 285 U.S. 22 (1932); *Detroit Trust Co. v. The Thomas Barlum*, 293 U.S. 21 (1934); *Romereo v. International Terminal Operating Co.*, 258 U.S. 254 (1959). As the Court stated in *Panama Railway*, *supra*.,

> [T]here is no room to doubt that the powers of Congress extends to the entire subject and permits of the widest discretion.
>
> * * *
>
> Congress is empowered by the constitutional provision to alter, qualify or supplement the maritime rules.
>
> 264 U.S. at 386, 388.

Likewise, in *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 215 (1922), the Court held:

> The Congress thus has paramount power to fix and determine the maritime law which shall prevail throughout the country.

In *Detroit Trust Co. v. The Thomas Barlum*, 293 U.S. 21, 52 (1934), the Court reasserted the principle that Congress, pursuant to its powers in Admiralty, is not limited by prior decisions of the Court:

> The authority of Congress to enact legislation of this nature [Ship Mortgage Act] was not limited by previous decision as to the extent of the admiralty jurisdiction. We have had abundant reason to realize that over experience and new conditions give rise to new conceptions of maritime concerns. These may require that former criteria of jurisdiction be abandoned, as for example, they were abandoned in discarding the doctrine that the admiralty jurisdiction was limited to tidewaters. *The Genesis Chief*, 12 How. 443, overruling *The Thomas Jefferson*, 10 Wheat. 428.

Accord, Panama Railroad, Co., supra.

We do not suggest that Congress' admiralty and maritime powers are limitless. In *Panama Railroad Co., supra.*, while acknowledging Congress' "wide discretion to alter, supplement, or modify admiralty

and maritime jurisdiction," the Court noted that there were two restrictions upon this power: Congress is restrained from enacting legislation which would undermine the uniformity of maritime law thereby contravening the constitutional policy of uniformity, and, legislation can not alter the boundaries of maritime law and admiralty jurisdiction "which inhere in those subjects . . . as by excluding a thing falling clearly within them or including a thing falling clearly without. 264 U.S. at 386.

The 1972 Amendments clearly do not contravene the constitutional policy of uniformity. The Act, by its terms, applies to all persons who satisfy the "situs" and "status" requirements and compensation is not dependent upon or affected by varying state laws. Indeed, one of the primary concerns expressed by Congress in amending the Act was to insure its uniform application. *See* S. Rpt. #92-1441, 92d Cong., 2d Sess., at 12; H. Rpt. #92-1441, 92d Cong., 2d Sess., at 10.

Likewise, the amended Act does not contravene the boundaries which inhere in admiralty and maritime jurisdiction.

The boundaries of admiralty and maritime jurisdiction have never been concretely defined or identified. As Mr. Justice Holmes noted in *The Blackheath*, 195 U.S. 361, 365 (1904): "The precise scope of admiralty jurisdiction is not a matter of obvious principle or of a very accurate history." Indeed, the Supreme Court reasserted this principle in the *Detroit Trust Co. vs. Barlum*, 293 U.S. *supra*., at 43:

> The constitution did not undertake to define the precise limits of that body of law or to lay down a criterion for drawing the boundary between maritime law and local law. Boundaries were to be determined in the exercise of the judicial power in recognition of the purpose of the grant.
>
> * * *
>
> The framers of the Constitution did not contemplate that the maritime law should remain unalterable.
>
> (Citations omitted)

Likewise, the Supreme Court has historically rejected the concept that our admiralty and maritime jurisdiction was limited to or confined to the meaning given to those terms by the English courts at the time the Constitution was adopted. See *e.g., The Genesee Chief*, 53 U.S. (18 How.) 443 (1851). Indeed, the Court in the *United States vs. Matson Navigation Company, et al.*, 201 F. 2d 610 (9th Cir. 1953), in upholding the constitutionality of the Admiralty Jurisdiction Extension Act of 1948, adopted the reason of Justice Story that

> the Constitution grant must be liberally construed to encompass all that can be included in the ancient laws, customs, and usage of the sea, not only in England before the restrictive statutes were passed, but also in the maritime courts of all the other powers of Europe.

See DeLovio vs. Boit, 2 Gall. 398, 7 Fed. Cas. No. 3,776 (C.C. Mass. 1815), cited with approval in *Insurance Co. vs. Durham*, 78 U.S. (11 Wall.) 1 (1870).

In 1972, Congress, in its discretion, chose to exercise its paramount powers over admiralty by specifically including within a uniform compensation statute a subject which has long been recognized as inhering in the general maritime laws of other nations, shipbuilding. Indeed, we submit, this is not the first instance in which Congress has exercised its powers because of its concern for shipbuilding which is primary to our maritime commerce. In *Richardson vs. Harmon*, 222 U.S. 96, 105 (1911), the Court noted that enacting legislation[7] limiting the liability of shipowners in their interest in a ship and its freight, Congress did so for the encouragement of shipbuilding and the employment of ships in commerce. It is of further significance that this limitation of liability included both tort and contract actions whether they were subjects strictly maritime or are non-maritime.

Both the language and the legislative history of the 1927 Longshoremen's Act established beyond question that it was enacted solely in the exercise of Congress's authority to revise the general maritime law under the admiralty clause. Indeed, it was clear that the motivating force for passage of the Act was the *exclusivity* of federal authority to provide a compensation remedy for at least some employees injured on the water.[8] And, since Congress's authority to enact

7 Act of March 3, 1851, 9 Stat. 635, and as extended by §18 of the Act of June 26, 1884, 23 Stat. 57.

8 *Southern Pacific Co. vs. Jensen*, 244 U.S. 205 (1917); *Knickerbocker Ice Co. vs. Stewart*, 253 U.S. 149 (1920); *Washington vs. W. C. Dawson & Co.*, *supra.*, 264 U.S. at 227.

legislation on the pattern of the Act pursuant to the admiralty power had already been approved by the very decision[9] that finally convinced Congress that there was no way to leave such matters to the states, the occasion to consider the Act as an exercise of any other power never arose.

But if any deficiency in Congress's authority to include shipbuilding or to extend the Act ashore were found to exist under the admiralty power alone, such extension could not be denied effect unless Congress *wholly* lacked such authority. The presumption of constitutional validity which attaches to all duly enacted statutes could hardly be overcome by a showing that a constitutional grant of power relied on in 1927, which was wholly adequate to support the law passed at the time, is inadequate to support the extension of that legislation enacted forty-five years later. Rather, Congress is deemed to have exercised all the authority it possesses to accomplish the end embodied in its enactments.[10] Thus, if it were found that the admiralty clause is an insufficient basis for the inclusion of shipbuilders and the shoreside extension of the Act, the Act must nevertheless be sustained unless it is beyond the combined reach of the admiralty *and* commerce powers. The complementary character of the two powers has been familiar for well over a century. *United States v. Coombs*, 37 U.S. (12 Pet.) 72, 76-79 (1838); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189-192 (1824). The two powers are entirely distinct; either or

9 *Washington vs. W. C. Dawson & Co.*, *supra.*, 264 U.S. at 227.

10 *Cf. United States vs. Carolene Products Co.*, 304 U.S. 144 (1938); *Heart of Atlanta Motel vs. United States*, 379 U.S. 241 (1964).

both may justify legislation, and neither limits the other. *The Genesee Chief*, 53 U.S. (18 How.) 443, 452 (1851); *The Lottawanna*, 88 U.S. (21 Wall.) 558, 577 (1875).

Before the 1972 Amendments to the Longshoremen's Act could be found to be beyond the proper scope of federal legislative authority, then, they must be measured against the whole of Congress' power derived from both sources. We submit that the authority of Congress to extend a federal compensation remedy as labor legislation under the commerce clause, is clear beyond argument. *E.g., Second Employers' Liability Cases*, 223 U.S. 1 (1912); *National Labor Relations Board vs. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *United States vs. Darby*, 312 U.S. 100 (1941); *cf. Katzenbach vs. McClung*, 379 U.S. 294 (1964).

We submit, therefore, that shipbuilding is a subject which inheres in the Constitutional grant of authority over admiralty and maritime affairs and that Congress has not abused its power and discretion[11] to include shipbuilders in a uniformly applicable compensation remedy.

PETITIONER'S AUTHORITY IS DISTINGUISHED

The Petitioner throughout its brief has relied heavily on the case of *Weyerhauser Co. vs. Gilmore*, 528

11 It should be noted that in exercising its power, Congress has acted in a limited fashion and that the 1972 Amendments to the Longshoremen's Act pertains only to that area of law generally deeminated as workers' compensation; Congress in enacting the Amendments has not chosen to bring within admiralty all contracts pertaining to new ship construction.

Fed. 2d 957 (9th Cir. 1975) and suggests a conflict between the *Weyerhauser case* and the *Halter Marine case* as applied to the case at bar.

The *Weyerhauser case* involved an injury to a "pondman" who was injured while working at his duties involving the sorting of logs and feeding them into a lumber mill for processing by moving about on walkways and logs which were floating on a salt water bay at the Pacific Ocean. This case is easily distinguished from the case at bar because Gilmore clearly was not engaged in "maritime employment" within the pervue of the 1972 Amendments. However, in the case at bar, Morgan clearly fits within the definition under the Act. It is undisputed that he was engaged in shipbuilding and his job description at least required him to do ship repair.

CONCLUSION

In view of the foregoing, it is submitted that Petitioner's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Respondents

CERTIFICATE

I, Bobby G. O'Barr, of counsel for Claimants-Respondents in the above styled matter, hereby certify that I have this day mailed three true copies of the foregoing Reply To Petition For Writ of Certiorari to Honorable George E. Morse, Attorney at Law, P. O. Box 100, Gulfport, MS 39501, Honorable George Williams, Jr., Attorney at Law, P. O. Box 149, Pascagoula, MS 39567, Honorable Eldon Bolton, Jr., Attorney at Law, P. O. Box 4077, Gulfport, MS 39501, and Miss Laurie Streeter, Associate Solicitor, United States Department of Labor, Room N-2716 NDOL, Washington, D.C. 20210.

This ____ day of October, 1977.

BOBBY G. O'BARR